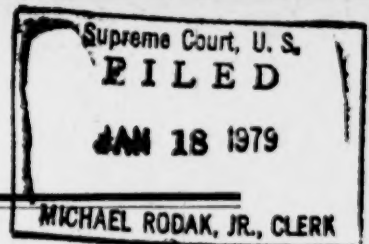


No. 78-812



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**In the Supreme Court of the United States**  
OCTOBER TERM, 1978

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ANDREW HOFER, PETITIONER

*v.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,  
ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

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**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

<sup>1</sup> We have substituted the Equal Employment Opportunity Commission (EEOC) as a respondent to replace the Civil Service Commission named by petitioner (Pet. 1-2). As a result of Pub. L. No. 95-454, 92 Stat. 1111, and Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36037, the Civil Service Commission was abolished effective January 1, 1979, and its functions were divided between two new agencies. An Office of Personnel Management was established with general responsibility for assisting the President in the management of the federal work force. Its functions include central examining, personnel investigations, personnel program evaluation, executive development and training. An independent Merit Systems Protection Board was created to resolve employee complaints and appeals. It hears and decides employee appeals and orders corrective and disciplinary action when appropriate. Under a separate authority, Reorganization Plan No. 1 of 1978, 43

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 581 F.2d 975. The order of the district court (Pet. App. 24a-25a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 13, 1978. A timely petition for rehearing was denied on August 18, 1978 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on November 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether, when a federal employee fails to seek judicial review within 30 days of a determination of the Civil Service Commission that he was not discriminated against on the basis of national origin, his right to judicial review is revived by a subsequent refusal of the Commission to reopen his case.

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Fed. Reg. 19807, the EEOC succeeds to the Civil Service Commission's responsibility for enforcement of provisions of Title VII of the Civil Rights Act affecting the federal government, including the determination of discrimination complaints of federal employees. We have substituted the EEOC for the Commission as a respondent because it is the agency now responsible for administrative review of Title VII complaints of federal employees.

### STATEMENT

Petitioner, a naturalized citizen of the United States born in Hungary, is employed by the Department of Health, Education, and Welfare as a GS-13 Information Specialist in the Office of Public Affairs of the Social Security Administration. Following pre-complaint processing in accordance with 5 C.F.R. 713.213, petitioner filed on June 21, 1972, a formal complaint charging HEW with discrimination based on national origin. His principal argument was that he had been given low employee-performance ratings and denied promotional opportunities as a result of discrimination by his immediate supervisor (Pet. App. 2a).

Following an investigation, the Social Security Administration issued to petitioner a notice proposing a finding of no discrimination. Petitioner requested a hearing in accordance with 5 C.F.R. 713.218. The hearing was held by a complaints examiner on September 12 and 13, 1973 (App. 7).<sup>2</sup> The complaints examiner recommended a finding of no discrimination but recommended corrective action as follows (App. 7):

It is evident that this complaint arose because of poor management and supervisory practices in the Office of Public Affairs. In the Analysis the Examiner referred to the confidential evaluation of the Office of Public Affairs [prepared by agency personnel officials] dated February

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<sup>2</sup> "App." refers to the appendix filed in the court of appeals.



1971. This report was submitted to the \* \* \* Deputy Assistant Commissioner for Administration and Deputy Assistant Commissioner for Labor Relations and Equal Opportunity. [This Official] expressed deep concern relative to the large portion of negative comments on the way the work force was being managed in the Office of Public Affairs. [This Official] stated that every effort must be made to ensure that management at all levels in Office of Public Affairs act to effect improvements in the management of personnel \* \* \*. The Deputy Assistant Commissioner for Administration should take immediate steps to insure that recommendations contained in his remarks on the 1971 evaluation are carried out.

The Examiner also recommends that [the two accused discriminatory officials] be required to attend \* \* \* courses such as "Supervisor and Group Performance".

\* \* \*

\* \* \* It is apparent that the Deputy Assistant Commissioner feels that [petitioner] has little chance of reaching his full promotional opportunities in the Office of Public Affairs. The Examiner feels strongly in the same vein and he recommends that the Deputy Assistant Commissioner, along with members of his staff, make every effort to have [petitioner] placed in a comparable position in another area of the [agency] where he will not come under the influence, supervision or control of any official of the Office of Public Affairs.

HEW's final decision adopted the recommended decision of the complaints examiner (App. 15-16). HEW notified petitioner of his right to appeal to the Board of Appeals and Review of the Civil Service Commission within 15 days of his receipt of the letter.

Petitioner filed a timely administrative appeal. On August 21, 1974, the Board issued its written decision, which was mailed to petitioner. The Board found no discrimination and affirmed HEW's decision (App. 5-14). Pursuant to 5 C.F.R. 713.282, the Board's decision also stated (App. 13):

Civil Service regulations provide that the Board's decision is final and there is no right of administrative appeal. However, if the complainant is not satisfied with the Board's decision in this case, he is authorized by section 717 (c) of the Civil Rights Act of 1964, as amended by the Act of March 24, 1972, to file a civil action in an appropriate U.S. District Court within thirty (30) calendar days of his receipt of the Board's decision in this case.

Petitioner did not file a civil action within 30 days. Almost a year later, in a letter dated June 16, 1975, he requested the Commissioners of the Civil Service Commission to reopen and reconsider the Board's final decision (App. 23-25). Petitioner's request was denied in a letter of September 2, 1975 (App. 27-28).

On October 6, 1975, petitioner filed this suit, alleging employment discrimination based on his national origin. The complaint alleged violation of his rights

under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e *et seq.*; the Civil Rights Act of 1870, 42 U.S.C. 1981; Executive Order No. 11,478, 34 Fed. Reg. 12985 (1969); and the Fifth Amendment. The complaint sought declaratory and injunctive relief and compensatory damages.

The district court held that it lacked jurisdiction because petitioner had not commenced the suit within 30 days of his receipt of the final decision of the Civil Service Commission of August 21, 1974, as required by 42 U.S.C. 2000e-16(c) (Pet. App. 24a-25a). The court of appeals affirmed, stating (*id.* at 5a):

When [petitioner] received the Board's \* \* \* adverse decision holding that he had not been discriminated against on the basis of national origin, the 30 day jurisdictional period in which to file a civil action commenced. His election to accept that determination and to rely on the Board's mandatory recommendations that the Social Security Administration take corrective action precludes an attempt, over a year later, to pursue judicial remedies.

#### ARGUMENT

1. Petitioner asserts that his employment discrimination suit against the government should not have been dismissed even though it was filed more than 400 days after his receipt of a final decision denying his claim. Petitioner concedes that 42 U.S.C. 2000e-16(c) expressly requires that such suits be filed "[w]ithin thirty days of receipt of notice of final

action."<sup>3</sup> The filing of a judicial complaint within the 30-day time period is a jurisdictional prerequisite and failure so to file requires dismissal of the complaint. *Brown v. General Services Administration*, 425 U.S. 820, 824-829 (1976). Petitioner argues, however, that the time to file suit began to run anew when the Civil Service Commission refused to reopen the case. Petitioner is incorrect.

Congress conferred on the Civil Service Commission authority to issue "such rules, regulations, orders and instructions" as were necessary and appropriate to carry out its responsibilities under the Civil Rights Act (42 U.S.C. 2000e-16(b)). Pursuant to this authority, the Commission provided that "[t]he decision of the board is final, but shall contain a notice of the right to file a civil action \* \* \*." See 5 C.F.R. 713.234. This regulation defining the procedure for Commission review is valid. *Allen v. United States*, 542 F.2d 176, 179-180 (3d Cir. 1976). See also *Clark v. Goode*, 499 F.2d 130 (4th Cir. 1974); *Chickillo v. C.O., Naval Air Engineering Center*, 406 F. Supp. 807 (E.D. Pa. 1976), *aff'd* 547 F.2d 1159 (3d Cir. 1977).

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<sup>3</sup> A complainant may sue without a final administrative decision only if his or her complaint has been pending for 180 days without final action. 42 U.S.C. 2000e-16(c). Petitioner does not dispute that the decision here was issued well within 180 days.

<sup>4</sup> Petitioner's statement (Pet. 7) that "the regulations do not specify which level of Commission action triggers the initiation of the period for filing suit" is thus incorrect.

To be sure, Commission regulations (5 C.F.R. 713.235) permit the Commission, under specified conditions, to reopen and reconsider any previous decisions of the Board. But if the mere denial of a request to reopen and reconsider is a new "final action" that generates a new 30-day period within which to institute suit, then the provisions of 42 U.S.C. 2000e-16(c) and 5 C.F.R. 713.234, which make the Board's decision final, would be substantially undermined. *Allen v. United States*, *supra*, 542 F.2d at 179-180. As the Fourth Circuit has put it in *Clark v. Goode*, *supra*, 499 F.2d at 133:

Logically, such an argument, if accepted, would in effect deny finality to any decision of the Commission and an aggrieved claimant could revive at any time his claim, however stale, by the simple expedient of filing \* \* \* a request to reopen.

Petitioner cannot improve his position by characterizing his request for reopening as a new claim not previously considered by the Commission—the alleged failure of the agency to abide by the prescribed corrective action—so that a new 30-day period began to run from the refusal of the Commission to grant relief (Pet. 7-8). The administrative relief recommended was not based on any apparent civil rights concern (see pages 3-4, *supra*), and petitioner's request to reopen was more a request to reconsider the discrimination question than to enforce the

Board's recommendation.<sup>5</sup> But even if petitioner had sought enforcement of the recommendation, and this were treated as a new claim, the district court would not have had jurisdiction under 42 U.S.C. 2000e-16(c) to review the denial of this corrective action. Without a finding of discrimination, no relief at all is required by Title VII. *Day v. Mathews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976). The recommendation for corrective action was made pursuant to the Board's responsibilities for federal personnel management. See 5 C.F.R. Part 713 and 713.221(c). Once the Board found that there was no discrimination and petitioner declined to seek review of that determination, petitioner was foreclosed from seeking any relief under Title VII. The remaining dispute regarding personnel procedures is not subject to judicial review under Section 2000e-16(c).

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<sup>5</sup> Although petitioner's request to reopen asserted that the agency had failed to comply with its commitment to place him in another position, he did so merely to call the Commissioners' attention to what he termed "further proof of the continuing discrimination and retaliation the agency has practiced against [him]" and as support for his belief that "a review [by the Commissioners] will result in a finding of discrimination and in an awarding [to him of] the requested relief [he] had originally sought" (App. 23-25). In sum, petitioner was seeking a reconsideration of the basic conclusion by the Board that he had not been discriminated against on the basis of his national origin. Similarly, the complaint filed in this action calls for review of the question whether petitioner was discriminated against on the basis of his national origin.



2. At all events, there is little likelihood that questions of this sort will recur. This case arose because of the dual responsibilities of the Commission in prescribing personnel adjustments in general and in enforcing Title VII. Under Reorganization Plan No. 1 of 1978 (see note 1) all responsibility for Title VII enforcement in federal employment has been transferred to the Equal Employment Opportunity Commission (EEOC). 43 Fed. Reg. 19807 (May 9, 1978). Because the Office of Personnel Management and the Merit Systems Protection Board, and not the EEOC, now are vested with general responsibility over federal personnel management matters, it is unlikely that the EEOC will prescribe corrective actions in cases, as here, not involving discrimination.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1979